STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
550 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

ORIGINAL

March 15, 1995

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: PR Docket No. 94-105

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the MOTION BY CALIFORNIA TO STRIKE EX PARTE FILINGS MADE BY AIRTOUCH in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine
Counsel for California

ESL:dd

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	PR Docket
Petition of the State of California	)	
and the Public Utilities Commission	)	
of the State of California to Retain	)	
Regulatory Authority Over Intrastate	)	
Cellular Service Rates	)	
	)	

MOTION BY CALIFORNIA TO STRIKE EX PARTE FILINGS MADE BY AIRTOUCH

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby move to strike from the public record those portions of ex parte filings made on March 8, 1995 by AirTouch Communications ("AirTouch") and its consultant, Jerry Hausman ("Hausman"), which include yet another study, dated January 3, 1995, which was not served on parties to this proceeding, and that is based on undisclosed and "confidential" data.

The formal comment cycle in this proceeding ended March 3, 1995. Nevertheless, on March 8, 1995 and citing the Federal Communication Commission's ("FCC") ex parte rules, AirTouch has introduced over fifty pages of additional material, a substantial portion of which consists of a wholly new study, based in part on data to which parties were denied access (and hence, the FCC agreed not to consider), and in part on new confidential pricing

and subscriber data. [1] The new study is dated January 3, 1995, and could easily have been submitted in conjunction with AirTouch's supplemental comments in opposition to the CPUC's petition. Instead, AirTouch chose to wait over two months, and days after the close of the formal comment cycle, to introduce the unpublished paper by its consultant, and hence effectively deny the CPUC the opportunity to respond to it.[2]

Such gamesmanship cannot be allowed. While the ex parte rules allow parties to make filings after the comment cycle has ended, in this case it is fundamentally unfair to permit AirTouch (or any other cellular carrier) to submit voluminous and additional new material, which AirTouch could easily have submitted during the formal comment cycle, and sandbag the CPUC. As a practical matter, given the tight scheduling adopted by the FCC in accordance with the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") in resolving the state petitions, the CPUC has effectively been denied its opportunity to respond to the new study and data. Accordingly, the additional material submitted by AirTouch should be stricken from the record herein and given no substantive consideration by the FCC. To do anything less

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1. On March 9, 1995, the CPUC received by facsimile twenty-one pages of AirTouch's ex parte filing. The Hausman paper, which consists of over thirty pages, was not received by the CPUC until Monday, March 13, 1995.

2. At the same time, notwithstanding that Hausman states "Please do not cite or quote" his preliminary draft, Hausman obviously wants the FCC to rely on it in this proceeding.

would constitute a denial of the CPUC's due process rights.[3]

Specifically, the new study introduced by AirTouch's consultant purports to demonstrate a correlation between cellular prices and regulation in California. Like an earlier study, submitted on behalf of Cellular Telecommunications Industry Association ("CTIA"), Hausman again relies on data disclosed to no one other than Hausman.[4] In addition, the new study is based on "confidential" price data [5] and "highly confidential" subscriber data.[6] No one, not even the FCC, has seen this data, and therefore no one has had the opportunity to assess their accuracy, validity, or usefulness.

In the First Confidentiality Order,[7] issued January 25, 1995, the FCC stated that "[i]f AirTouch and CTIA wish the Commission to consider Hausman's analysis in its substantive review of California's petition, those carriers must provide the Commission with the underlying data used to conduct Hausman's

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3. Indeed, the CPUC understands that AirTouch has continued to make additional filings since March 8. At over 2000 miles from Washington, D.C., the CPUC has no effective opportunity to review any of these unserved ex parte submissions, let alone timely respond to them.

4. This study includes data for the years 1989-1993 which CTIA refused to disclose to the CPUC upon its request. Emergency Motion to Compel Production, filed by California on September 29, 1994.

5. Study at 14.

6. Study at 21.

7. In the Matter of Petition of the State of California and the Public Utilities Commission of the State of California, et al., PR Docket Nos. 94-103, et al., Order, released January 25, 1995.

analysis..." Order at ¶¶38, 48 and 49. Neither AirTouch nor CTIA has ever provided this data. Hence, like the CTIA study, this new study, based in part on the same undisclosed data, cannot fairly be considered in the FCC's substantive review of the CPUC's petition.

In addition, Hausman admits that he relied upon confidential pricing information and subscriber information in producing his study. The CPUC has had no access to any confidential pricing information. Moreover, Hausman indicated that he used nationwide subscriber data, which is obviously different from the statewide data used by the CPUC in its analysis. In both cases, the CPUC has had no opportunity to determine the accuracy of the data, how the data was used or adjusted, what data base was used, how the data was interpreted, and the validity of conclusions drawn from the data. The CPUC likewise has had no opportunity to determine the validity of his new regression analysis, which contains new variables (e.g., building costs, tax rates) or his new "consumer welfare" analysis. Given the serious flaws identified by the CPUC and others in Hausman's previously submitted study on behalf of AirTouch, the FCC should place no confidence in this new study.

In short, it is fundamentally unfair to allow AirTouch (or any other party) to introduce after the close of the comment cycle new materials, based on confidential data, which deprives the CPUC to effectively respond. The FCC has defined a tight pleading cycle in accordance with the short time frame allowed under the Budget Act to review the state petitions to retain regulatory oversight of intrastate cellular service rates. By

giving the CPUC and other states the final opportunity to respond to oppositions to their petition, the pleading cycle recognizes that the CPUC and other states have the burden of proof in this proceeding. To allow AirTouch and any other party to make a voluminous, last minute ex parte filing which introduces new material in an attempt to defeat the CPUC petition makes a mockery of the FCC's orderly pleading process, and is patently unfair and violative of the CPUC's due process rights. Accordingly, the FCC should strike from this record any ex parte materials, including the study, dated January 3, 1995, submitted by AirTouch.[8]

Respectfully submitted,

PETER ARTH, JR.
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March 15, 1995

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8. The CPUC has no knowledge of other ex parte filings made by other cellular carriers. To the extent that they exist and introduce new material not previously submitted and served during the formal comment cycle, the CPUC equally objects and moves to strike such filings.

CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 15th day of March, 1995, a true and correct copy of the foregoing MOTION BY CALIFORNIA TO STRIKE EX PARTE FILINGS MADE BY AIRTOUCH was mailed first class, postage prepaid to all known parties of record.

Ellen S. LeVine

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